[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
Appellant,

vs.

THE CITY OF LINCOLN, NEBRASKA et al.,
Appellees.

[redacted]

CHARLES A. FERGUSON,
Counsel for Appellees.

General No. 25574.
Term No. 744.
October Term, 1916.

IN THE

Supreme Court of the United States.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
Appellant,

v.

THE CITY OF LINCOLN, NEBRASKA *et al.*,
Appellees.

MEMORANDUM OF APPELLANT IN OPPOSITION TO MOTION TO ADVANCE.

The appellant herein respectfully opposes the motion to advance the hearing of this appeal (at least, at the present time) for the following reasons:

This is not, we submit, a case "once adjudicated by this Court upon the merits."

This action was commenced in December, 1906, for an injunction restraining the City of Lincoln from enforcing a certain ordinance of said City

adopted in November, 1906, providing in substance that no gas company in said City should charge more than $1.00 net per M feet of gas sold. The appellant was at that time charging $1.20 per M feet of gas sold. A temporary restraining order was obtained and the Company put up a bond to reimburse the gas users of the City of Lincoln for the difference between the $1.00 rate and the $1.20 rate, in the event that the case went against the Company.

A decision was rendered by the lower Court adverse to the Company, but the restraining order was continued. An appeal was taken in the Supreme Court of the United States and the decision of the Court below was reversed by a unanimous Court, with an opinion by Mr. Justice Lurton (reported 223 U. S., 349).

This decision of the Supreme Court was not, we submit, an "adjudication upon the merits," as a consideration of said opinion will immediately reveal, for the Supreme Court decided that the record in said appeal did not contain facts sufficient to enable the Supreme Court to pass upon the questions involved. This is clearly shown by the opinion of Mr. Justice Lurton. He said (page 361):

> "This case is full of difficult and grave questions. Such conclusions as to facts as are found in the court's opinion are not helpful when, as here, errors are assigned which open up substantially the whole case. The cause should have gone at the beginning to a skilled master, upon whose report specific errors could have been assigned and a ruling from the court obtained."

And again, on pages 364-5:

> "The facts found are not full enough to at

all justify this court in dealing with this problem of a replacement fund.

"There should be a full report upon past depreciation, past expense for reconstruction or replacement, and past operating expenses, including current repairs. We should be advised as to the gross receipts for recent years, and just how these receipts have been expended. Then the amount to be set aside for future depreciation will depend upon the character and probable life of the property and the method adopted in the past to preserve the property. It can be readily seen that the amount to be annually set aside may be such as to forbid rate reductions, because of the requirement of such a fund. The matter is one first for a skilled master, who should make a full report upon the value of the property, the receipts and the expenses of operation and the sums paid out on reconstruction and replacements, and in dividends in recent years.

"For the reasons indicated, we direct that the decree be

"REVERSED, and the cause remanded to the district court to refer the case to a competent and skilled master, to report fully his findings upon all of the questions raised by either party, separately, and with leave to both parties to take any additional evidence they may wish within a time to be fixed by the court, and that that court upon such report proceed as equity shall require."

It appears, therefore, that the prior appeal in this case was not adjudicated on the merits, but, on the contrary, the Supreme Court determined that it was unable to decide the case upon the merits because the facts found were not full enough to justify the Court in dealing with the problems involved; so the case was sent back to the lower Court to be referred to a skilled master with leave

to take additional testimony, with directions to the lower Court to proceed "as equity shall require." Pursuant to this order the case went to a Master, and new and additional evidence was taken amounting to several thousand pages of testimony and a multitude of exhibits. The record on this appeal, therefore, is an entirely different one from the record in the prior appeal so that all the matters involved in this appeal will have to be taken up *de novo* by this Court. We submit, therefore, that this case has not been "once adjudicated by this Court upon the merits."

Furthermore, although this case was originally brought in order to obtain an injunction against the enforcement of an ordinance, and a temporary restraining order was granted and the enforcement of the ordinance was thus held in obeyance for a period of years upon the Company's giving a bond to reimburse the gas users of the City of Lincoln, the fact now is that the Company, on May 1st, 1915, voluntarily put into effect the $1.00 rate (although with an understanding that this should not prejudice their rights in this action). So, therefore, the question of the validity of the ordinance is now material only insofar as it relates to the reimbursement of the users of gas in the City of Lincoln for the difference between the $1.00 and the $1.20 rate during the period when the restraining order was in effect; in other words, the case now resolves itself into a simple action for a money judgment, and the only practical effect of this appeal is whether the users of gas in the City of Lincoln between December, 1906 and May, 1915, are entitled to reimbursement to the extent of 20 cents per M feet of gas used. To cover this situation the Company has filed a bond in the sum of $575,000, which

amply protects the parties in interest in the event this appeal should be determined against the Company.

So that there would appear to be no urgent necessity of an immediate disposition of this case by reason of the fact that a Municipal ordinance is being held in abeyance, but, on the contrary, the only result of the decision of this appeal is the question of the liability of the Company to make refunds to gas users who are protected both as to principal and interest by the bond filed in respect thereof.

But we submit that the most important reason why this cause should not be advanced is the following:

The $1.00 gas rate which the Company voluntarily adopted in May, 1915, has now been in effect for practically one year and a half, so that the result of the $1.00 rate is no longer a question of speculation or prophecy, but can now be determined as a question of concrete fact. This is of the utmost importance for the reason that the Special Master in making his findings, although he determined that an earning rate of 6% constituted a reasonable return upon the investment of the property, found, according to his own figures, that the Company actually earned in the year 1907 (the first year when the rate ordinance would have been in effect) only 5.12% upon its investment as he found it. But he justifies sustaining the validity of the rate ordinance on the ground that if the $1.00 rate had been put into effect an increased consumption of gas and an increase in earnings would quickly follow the reduction in price, and he concludes that with gas selling at $1.00 per M. cubic

feet the plaintiff would have received not less than 6% upon the value of its investment.

This, it will be seen, is a mere speculation or estimate as to what would have been the fact if certain conditions had been in existence. But now that the $1.00 rate has actually been in force for approximately a year and a half, there is no further necessity of speculating or estimating about the increased gas consumption, or earnings under the reduced rate, and it can now be determined beyond any question of doubt by existing facts whether the result is in accordance with the Master's conjecture.

For this reason it is the purpose of the appellant in this case to file with this Court a motion for leave to file a bill of review in order that evidence may be taken showing the exact result as regards increase or decrease in gas consumption during the last year and a half when the $1.00 rate was in effect. It is our contention that such evidence should be before the Supreme Court in order to enable it to properly pass upon the questions upon this appeal, and we believe that it will conclusively show practically no increased earnings from said reduction.

The appeal in this case was perfected October 24th, 1916, and the appellant was waiting January 1st, 1917, in order to compile figures showing the result of a year and a half's operation under the $1.00 rate. Upon the compilation of such figures the appellant intended to present its motion for leave to file a bill of review to this Court. The figures for the month of December, 1916, are not now available, but will be available in the course of a few days when the appellant will be in a position

to prepare its data for said motion for leave to file a bill of review.

In this connection we beg to point out that this Court has always deemed it of the utmost importance in determining the validity of a rate ordinance to see the effect of the actual working of said ordinance rather than to make its decision upon estimates as to what would happen if the ordinance were in effect. In the recent case of Des Moines Gas Company against Des Moines, 238 U. S., 153, this Court, although it decided in favor of the rate ordinance, concluded as follows:

> "While we agree with the court below that it was right to confirm the Master's report and dismiss the bill, we think, in view of the fact that the attack upon the rates was made before the ordinance went into effect, and before actual application of the rates could demonstrate whether they were remunerative or not, that the court should have followed the recommendation of the Master and dismissed the bill without prejudice. We think this is particularly so, in view of the fact that ordinarily time alone can satisfactorily demonstrate in a case like this whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate-making cases. The Master's suggestion has the support of the judgment of this court in *Knoxville* v. *Water Co.*, 212 U. S., 1, and *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19.
>
> "With the modification that the bill be dismissed without prejudice, instead of, as the court below directed, with prejudice, the decree is affirmed, with costs."

So also in the Consolidated Gas Company case,

212 U. S., 19, this Court, although it decided against the Company and in favor of the rate ordinance, concluded its opinion as follows:

> "It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and
>
> "IT IS SO ORDERED."

In the present case, therefore, inasmuch as the $1.00 rate fixed by the ordinance has been tried out by practical experience for a year and a half, it should not be necessary for the Company to bring another action to test the validity of the rate ordinance, or its liability for refunds, because all the questions which might be involved in a subsequent proceeding can now be determined as matters of fact, and we submit that it would be most expeditious and also quite in harmony with the spirit of the decisions of this Court heretofore made, to ascertain the facts presented by the actual operation of the ordinance prior to or at the time of the hearing of this appeal, and it was for this purpose that the Company intended to present its appeal to review in order that those facts might be placed before the Court.

If this case is advanced upon this motion there will be no opportunity to bring out the facts in connection with actual operation of the ordinance, and, therefore, we submit that this motion should be denied, or, in any event, it should be held in

abeyance until the appellant had an opportunity to present its motion for leave to file a bill of review, in respect to the matters above set forth, which motion the appellant hereby agrees to present with all diligence, if given opportunity so to do, just as soon as the earnings for the month of December, 1916, are available.

Respectfully submitted,

CHARLES A. FRUEAUFF,

Counsel for Appellant.

Supreme Court of the United States

LINCOLN GAS & ELECTRIC LIGHT COMPANY, Appellant. *v.* THE CITY OF LINCOLN, *et al.*, Appellees.	October Term, 1917. No. 300.

PETITION FOR LEAVE TO FILE BILL OF REVIEW IN COURT BELOW OR TO TAKE FURTHER PROOF.

To the Honorable the Justices of the Supreme Court of the United States:

Now comes Lincoln Gas & Electric Light Company, a corporation, appellant, and respectfully renews its motion for leave to file a bill of review in the Court below in this case, heretofore made to this Honorable Court on or about the 26th day of March, 1917, and prays for leave to take further proof upon all the grounds and for all the reasons set forth in the motion papers heretofore filed in said motion to this Court, made on or about March 26th, 1917, and for further reason in support of said motion appellant avers and shows that the figures showing the result of the actual operation of the $1.00 gas rate in the City of Lincoln, since January 1st, 1917, and up to September 1st, 1917, are now available, and appellant desires to present

the evidence of the actual operation during said months, in order that this Honorable Court may have the same before it when considering the matters of value and return embraced in the record now on file in this appeal, and in considering its decree to be entered herein.

That the bill of review which appellant now petitions leave to file is in substantially the form presented in the motion papers on or about March 26th, 1917, with such modifications as will permit the taking of testimony showing the actual operation of the $1.00 gas rate between January 1st, 1917, and September 1st, 1917.

That appellant files herewith the affidavit of Edgar E. McWhiney, Assistant Secretary of appellant, showing the earnings of appellant since January 1st, 1917, up to which date the same were set before this Honorable Court in said previously filed bill of review, and that said affidavit shows the operating expenses of appellant to have reached a point so that the same are in excess of the price charged for gas, that is, without allowing for any depreciation whatsoever or for any allowance whatever for return upon invested capital, or without any allowance whatever for the Occupation Tax in issue in said proceedings, the $1.00 rate for gas is insufficient to pay appellant's actual operating expenses.

That the appellant, since the taking of the testimony in the Court below, and up to the present time, has in all things handled its property in a proper, customary and economical manner, and has paid out no dividends, and has kept its books and records of account according to the same manner and system as heretofore, and as during the period when the evidence was taken in the Court below.

That in view of the established practice in this Honorable Court, in respect of cases involving rate

litigation, and in which it shall have been determined by this Honorable Court to dismiss a bill to enjoin rate legislation, that the same be dismissed without prejudice, until the application of the rates can be demonstrated by an actual trial and test, appellant begs leave to point out to this Honorable Court that the rate in litigation in this case has been in effect for approximately two years and five months, that it has had an actual trial and test, and the results of its application can now be successfully demonstrated. So that there is now available to place in the record of this case before this Honorable Court the facts shown by an actual trial of this rate, and that it is unnecessary, therefore, for the Court to wait further for any demonstration of the actual application of the rate. In view of this situation, appellant submits to this Honorable Court that it is most expedient, in view of the established practice of this Court, to have placed the facts shown by the actual trial and test of the rate before this Court, rather than to consider the record as it now stands, without a complete report of the actual facts which result from the application of the rate, or to make any disposition of this case which would require the presentation of a new petition or a reinstitution of the action in order to prove the facts shown by the actual trial of the rate. The actual showing of the complete confiscation of appellant's property should be before this Honorable Court for its information in determining the many matters involved on this appeal.

Wherefore, by reason of said subsequent happenings in the nature of newly discovered evidence and happenings subsequent to the entry of the decree in the Court below, and for all the reasons hereinbefore stated, and as set forth in said prior motion of March 26th, 1917, appellant prays that:

1. Further proof be ordered to be taken by this

Court, by depositions to be taken by a Commission to be issued either from this Court or the Court below, pursuant to Subdivision 1 of Rule XII of the rules of this Honorable Court.

2. In the alternative, that it be permitted to file in the United States District Court for the District of Nebraska, Lincoln Division, its bill of review in substantially the form presented to this Honorable Court on or about March 26th, 1917, with such modifications as are necessary to include the evidence which has developed between January 1st, 1917, and September 1st, 1917, or such other and further supplemental bill in the nature of a bill of review as may be proper to bring to the attention of the Court below and to this Honorable Court the result of the trial and test of said gas rate of $1.00 net per thousand cubic feet, and that it be permitted to take testimony bringing its earnings and other matters involved down to the latest practicable date.

3. This cause be continued on the docket of this Honorable Court until the proofs are taken in either of the manners aforesaid and brought upon the record of this cause in this Honorable Court.

4. This Honorable Court may order the Court below to make, or cause to be made, such definite decisions and findings as will correct upon the record the alleged errors of law apparent upon the face of the record, as set forth in the motion papers of March 26th, 1917.

And the appellant prays for such other and further and appropriate relief as to this Honorable Court may seem proper.

EDMUND C. STRODE,
CHARLES A. FRUEAUFF,
Solicitors for Appellant.

ROBERT BURNS,
Of Counsel.

State of New York,
County of New York, } ss.:

Frank W. Frueauff, being first duly sworn, deposes and says that he is President of Lincoln Gas & Electric Light Company; that he has read and knows the contents of the foregoing pleading and petition for leave to file bill of review; that he has personal knowledge of the facts referred to therein relating to the trial and test of the said gas rate; that he had no knowledge of said facts at the time of the hearing of the cause below, or when the original decree was entered upon the 15th day of June, 1915; that such facts have come to his personal knowledge since the original decree was entered in this case upon the 15th day of June, 1915, and that said facts could not have been discovered in the exercise of reasonable diligence, and could not have been produced nor possibly have been used at the time when the decree was passed, and that the statements, allegations and averments of fact in the foregoing pleading, and the bill of review therein mentioned, are true. And further affiant sayeth not.

FRANK W. FRUEAUFF.

Subscribed and sworn to before me this
25th day of September, 1917.

George C. Blankner,
[NOTARIAL SEAL.] Notary Public,
New York County No. 405.
New York Register's No. 9344.
My commission expires March 30, 1919.

SUPREME COURT OF THE UNITED STATES.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, Appellant. *v.* THE CITY OF LINCOLN, *et al.*, Appellees.	Affidavit.

State of New York, County of New York, } ss.:

Edgar E. McWhiney, being first duly sworn, deposes and says that he is Assistant Secretary of Lincoln Gas & Electric Light Company, and has examined the records and reports of the Lincoln Gas & Electric Light Company, and has familiarized himself with them, for the purpose of securing the figures for this affidavit, and has examined the affidavit of V. L. Board, submitted with the papers on the motion made to the Supreme Court of the United States on March 26th, 1917, in this cause; that he has carefully checked over the same and states as follows:

That beginning approximately from May 1st, 1915, Lincoln Gas & Electric Light Company has billed customers for gas consumed at the rate of $1.00 net per thousand cubic feet; that the rate of gas consumed prior thereto and for the period of about eight years or more had been $1.20 net per thousand cubic feet.

Affiant states that the expenses of the Company have been steadily increasing in almost all items; that the costs of labor, coal, gas, oil and all materials involved in gas making and distribution have largely increased in cost since January 1, 1917, the date of the last figures included in the said affidavit

of said V. L. Board, and that the last complete month of operation is the month of August, which shows that the total sales of gas in the City of Lincoln were 18,975,400 cubic feet, that the operating expenses for such month (not including the 3% Occupation Tax, nor any amount for depreciation whatsoever) were $19,090.88. If said Occupation Tax and a sum for depreciation, at the rate allowed by the Master for 1912, were calculated and added to said expenses, the operating expenses for said month would be $20,667.18. In said sums, as expenses, there is not included any sum whatsoever for any allowance for return on invested capital, and any return to which appellant is entitled on invested capital would be a loss in addition to the amount by which the operation expenses exceed revenue.

That the operating expenses for the month of August per thousand cubic feet of gas sold (without calculating the 3% Occupation Tax or depreciation, or any return on invested capital) were $1.0061; that said operating expenses per thousand cubic feet of gas sold, including depreciation (but not including the 3% Occupation Tax for said month, or any return on invested capital) were $1.0588; that said operating expenses per thousand cubic feet of gas sold for said month, including depreciation and the 3% Occupation Tax (but not including any return on invested capital) were $1.0892.

That the above figures show that gas is now being sold in Lincoln for a price actually less than operating cost, with no allowance whatsoever for return on invested capital, and this fact is true even if depreciation and the 3% Occupation Tax are not included as operating charges.

That the cost of operation is steadily increasing, is shown by the operating expense per thousand cubic feet of gas sold since January 1st, 1917, in-

cluding Occupation Tax and depreciation, a tabulation of which is as follows:

1917	Operating Cost per M Cu. Ft.
January	$.8516
February	.7724
March	.8655
April	.8230
May	.8844
June	.9044
July	1.0046
August	1.0892

The above operating expenses include no allowance whatsoever for return on invested capital.

Affiant further states that since the organization of this Company no dividends whatever have been paid to its stockholders, nor have any unusual or extraordinary expenses of any kind or character whatsoever been made; that since the passage of the rate-fixing Ordinance, and since the taking of the testimony before the Master, and since the perfection of the appeal in this case, the business of the Company has been carried on in its usual, customary and ordinary manner, and that its books and records of account have been kept according to the same method and system as at the time the evidence was taken in this case.

EDGAR E. McWHINEY.

Sworn to before me this 25th day of September, 1917.

George C. Blankner,
Notary Public,
New York County No. 405.
New York Register's No. 9344.
My commission expires March 30, 1919.

[NOTARIAL SEAL.]

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General Number 25574.

IN THE

SUPREME COURT

OF THE

UNITED STATES

Term Number [redacted] 3[redacted]52

October Term, 1916.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
APPELLANT,

VS.

THE CITY OF LINCOLN, NEBRASKA, ET AL.,
APPELLEES.

MEMORANDUM BRIEF OF APPELLEES IN SUPPORT OF MOTION TO ADVANCE,

AND

IN OPPOSITION TO APPELLANT'S APPLICATION TO FILE A BILL OF REVIEW.

GEORGE W. BERGE, and
WILLIAM M. MORNING,
Counsel for Appellees.

WEKESSER, The Brief Man, Lincoln, Nebraska

General Number 25574.

IN THE

SUPREME COURT

OF THE

UNITED STATES

Term Number 744.

October Term, 1916.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
APPELLANT,

VS.

THE CITY OF LINCOLN, NEBRASKA, ET AL.,
APPELLEES.

MEMORANDUM BRIEF OF APPELLEES IN SUPPORT OF MOTION TO ADVANCE,

AND

IN OPPOSITION TO APPELLANT'S APPLICATION TO FILE A BILL OF REVIEW.

GEORGE W. BERGE, and
WILLIAM M. MORNING,
Counsel for Appellees.

ON THE MOTION TO ADVANCE.

It is the contention of appellees that this case comes within Section 4 of Rule 26 of this court, which reads :

> "Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party."

The first appeal was from a final decree of the court below. The case was briefed, argued, and submitted to this court on its merits. The only thing before the court for adjudication was the case upon its merits. The opinion of this court by Mr. Justice Lurton (223 U. S. 349) shows that the court went into the merits of the case, and reversed the decree of the lower court and remanded the cause with specific directions to refer it to a special master to report fully his findings upon all questions raised by either party with leave to both parties to take such additional evidence as they might desire.

This was not a final disposition of the case, it is true, but it was an adjudication or judgment on its merits. The word "merits" is used in law to distinguish matters of substance from technical or collateral matters raised in the course of the suit.

Wolfe v. *Georgia, etc., Co.*, 65 S. E. 62.

Smoot v. *Judd*, 184 Mo. 508, 83 S. W. 481.

Taylor v. *Carr*, 125 Tenn. 235, Ann. Cas. 1913 C. 155, 141 S. W. 745.

N. P. R. Co. v. *Barlow*, 126 N. W. 233, 20 N. D. 197, Ann. Cas. 1912 C. 763.

People v. *Lyman*, 65 N. Y. S. 1062.

In *Ayres* v. *Polsdorfer*, 187 U. S. 585, 47 L. Ed. 314, this court in determining a question of jurisdiction had occasion to pass upon the meaning of the expression "upon its merits," as used in an earlier opinion of this court. Interpreting the expression, Mr. Justice McKenna said:

> "The expression 'upon the merits' was used in distinction to the review of a question of jurisdiction strictly so called—the right of the circuit court to entertain the case at all."

The term "merits" was similarly explained in *Russell* v. *Whitcomb*, 14 S. D. 426, 85 N. W. 860, where it was said:

> "Under Comp. Laws, Sec. 5236 Subd. 4, providing that an order involving the *merits* of an action, or some part

thereof, is appealable, an order appointing a referee to hear and determine all issues is appealable."

See also:

St. Paul, etc. R. Co. v. *Gardner,* 19 Minn. 132.

A cause is submitted to a court "on the merits" when the submission involves matters of substance as distinguished from matters of form; when the substantive rights of the parties are presented as distinguished from technical or collateral matters.

27 *Cyc.,* 483.
3 *C. J.,* 451.
Ordway v. *Boston, etc., R. Co.,* 69 N. H. 429, 45 Atl. 243.
Clanson v. *Gunnison,* 12 Wis. 528 (529).
Plano Mfg. Co. v. *Kaufert,* 86 Minn. 13, 89 N. W. 1124.
Hirschbach v. *Kitchum,* 80 N. Y. S. 143.

The word "adjudicated" as used in the rule under consideration, is synonymous with "judicially determined" or "adjudged."

1 *C. J.,* 1236.
Western Assur. Co. v. *Klein,* 48 Neb. 904 (908).

In short the cause was submitted to this court on its merits and a judgment of reversal was entered. It was not necessary for the judgment of this court to be a final disposition of the case to bring it within the rule. To hold otherwise would be to abrogate the rule itself because, if finally disposed of, it would not come here the second time.

AS TO THE APPLICATION FOR A BILL OF REVIEW.

The only reason assigned by appellant as a ground for such a bill is that on May 1st, 1915, it voluntarily put the one dollar gas rate into effect; that it has operated under that rate ever since and now has figures based upon actual experience to show that the rate is not compensatory. This does not entitle appellant to a bill of review for the following reasons:

1. The new rate referred to was put into effect May 1, 1915, under a written stipulation between the parties which expressly provided that the action of appellant in installing said rate should not be used in any way by either party to influence the action of the court in the disposition of this case. The stipulation was as follows:

"IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

STIPULATION

Lincoln Gas & Electric Light Company, a corporation, Complainant,

vs

City of Lincoln, et al., Defendants.

It is stipulated and agreed between the parties hereto that the action of the Lincoln Gas & Electric Light Company in inaugurating a new gas rate as of May 1st, 1915, of $1.15 gross with a net rate of $1.00 per 1,000 cubic feet for gas if paid within the discount period, shall not be considered or construed as an acceptance of or compliance with the gas ordinance of 1906, the validity of which is involved in the above entitled cause; and the action of the Gas Company in establishing such a new rate shall not be shown in evidence or presented to the court in the above entitled cause, or used in any way by either party to influence the action of the court in the disposition of the case involving the validity of said 1906 gas ordinance.

(Signed) FRED C. FOSTER,
W. M. MORNING,
Attorneys for City of Lincoln.

E. C. STRODE,
Attorney for Lincoln Gas & Electric Light Company.

2. The appellant could and should have tried out this new rate at the start so as to base its action upon actual experience rather than upon theory, speculation and prophecy. That is what this court has always indicated should be done.

See:

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382.

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371.

But appellant attacked the rate before it was put to a practical test, and litigated it from December 1906 to May 1, 1915, almost nine years, before giving the rate a trial. Having thus chosen its own time and mode of attack, and having, from the start, elected to rest its case upon theory and speculation, it cannot now call to its aid a practical test of the rate which should have preceded its attack.

In the language of Mr. Justice Moody, in *Knoxville* v. *Knoxville Water Co., supra:*

> "If a Company of this kind choses to decline to observe an ordinance of this nature and prefers rather to go into Court with the claim that the ordinance is unconstitutional, *it must be prepared to show to the satisfaction of the Court that the ordinance would necessarily be so confiscatory in its effect as to violate the constitution of the United States.*"

3. A bill of review will not be granted for newly discovered evidence unless it be shown that the evidence was not known *and could not with reasonable diligence have been known before the decree complained of was entered.*

Beard v. *Burts,* 95 U. S. 434, 24 L. Ed. 485.
Nickle v. *Stewart,* 111 U. S. 776, 28 L. Ed. 599.
Pool v. *Nixon,* 9 Pet. 770, 9 L. Ed. 305.
Hill v. *Phelps,* 101 Fed. 650.
Camp Mfg. Co. v. *Parker,* 121 Fed. 195.
Kelly Bros. v. *Diamond Drill & Match Co.,* 142 Fed. 868.

When complainant attacked this rate it did so with full knowledge of the importance attached by this and other courts to a practical test of an established rate. It was well aware of the heavy burden it assumed in attempting to strike down this rate in advance of a practical test. It is not now in a position to appeal to a court of equity for leave to do what it could and should have done in advance. It should not be permitted now to "amend its hold" by calling to its aid that which was within its easy reach at the beginning.

See:

Scotten v. *Littlefield*, 235 U. S. 407, 59 L. Ed. 289.

Leave to file a bill of review can only be obtained from the court in which the decree was rendered.

Camp Mfg. Co. v. *Parker*, 121 Fed. 195.

4. By appellant's own confession it will be seen that nothing is now involved in this litigation aside from the question of whether the appellant shall refund to gas consumers the amount collected from them in excess of the $1.00 rate during the time the same was suspended by the injunction herein. The $1.00 rate has been in force only since May 1, 1915. All of the experience of appellant as to the practical application of that rate has been acquired since that date, whereas, the refunds to gas consumers here involved all accrued prior to that date. It could have little if any bearing upon the validity of the rate in December, 1906.

We understand the rule to be that all rates established by rate-making bodies are subject to revision to meet the exigencies of changing conditions. A rate may be too low when adopted, and, if satisfied of that fact, this court will enjoin its enforcement until such time as it can be shown that conditions have so changed as to render the rate compensatory, and will permit the public to make such showing, as was done in *Smyth* v. *Ames*, 169 U. S. 819, 42 L. Ed. 819.

On the other hand, in cases where injunctions against established rates have been denied, this court has uniformly adhered to the practice of dismissing the bill without prejudice so as not to preclude the complaining party from again attacking the rate if future conditions or experience shall justify such attack.

Des Moines Gas Co. v. *Des Moines*, 238 U. S. 153, 59 L. Ed. 1244.

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371.

Any experience gained by the Company through its belated practical test of the $1.00 rate since May 1, 1915, is so remote in time as to have little, if any, evidential value as to the validity of the rate between 1906 and May, 1915, and would not be sufficiently pertinent and controlling to justify a bill of review.

See:

Society of Shokes v. *Watson*, 77 Fed. 512.
Jourhnond v. *Ewing*, 85 Fed. 103.
Keith v. *Alger*, 124 Fed. 35.

5. If complainant wishes to attack the present $1.00 rate because changing conditions have rendered that rate inadequate, it can call to its aid the practical result of the operation of that rate since May 1, 1915, but its attack would be either by a new bill or a supplemental bill filed in the court below. Evidence of how the rate is now operating would serve no purpose in an inquiry as to how it would have operated ten years ago. It would not tend to shed light upon the same controversy.

Newly discovered evidence as a basis for a bill of review must relate to the matter controverted on the original hearing.

Poole v. *Nixon*, 9 Pet. 770, 9 L. Ed. 305.
Thompson v. *Wooster*, 114 U. S. 104, 29 L. Ed. 105.
Shelton v. *VanKleeck*, 106 U. S. 532, 27 L. Ed. 269.
Accord v. *Western Pocahontas*, 174 Fed. 1019.

6. Under no circumstances should the experience of the appellant with the $1.00 rate be permitted in any manner to influence the disposition of the present appeal. Under every rule and principle of appellate procedure the appeal must be determined upon the record as brought from the court below. We do not know what figures appellant is prepared to produce as the result of its experience with this new rate since May 1, 1915, but we do know that such figures were not before the court below; that they have all arisen since the Master's report was filed; that no opportunity has been given the City

of Lincoln to investigate and analyze these figures, and that they would be very misleading without a thorough and painstaking analysis.

As we understand it, permission to appellant to file a bill of review would be equivalent to the granting of a new trial of the case, and this, under all the circumstances, and in view of the long years of tedious and expensive litigation to which the City has been subjected is unthinkable, especially since appellant could and should have made its practical test of the rate at the start.

Respectfully submitted,

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